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## Drug Testing As An Element Of The Everlasting Drug War

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# Drug Testing As An Element Of The Everlasting Drug War

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## **Abstract**

Over the past decade, the federal government, through the legislative branch, the executive branch and the judicial branch, has attempted to thwart drug abuse and drug smuggling.

**KEYWORDS:** drug, war, smuggling

# Drug Testing As An Element Of The Everlasting Drug War

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## I. Introduction

Over the past decade, the federal government, through the legislative branch, the executive branch and the judicial branch, has attempted to thwart drug abuse and drug smuggling. Congress has acted to toughen criminal laws against the smuggler; the White House and the Pentagon have acquiesced in allowing the military to be used to fight the smuggler's enterprise; and our courts have imposed tougher sentences and still higher bail requirements to impede the drug runner's success. Our federal government to date has failed to curb drug abuse and has failed miserably at stopping drug smuggling.

From 1975 to 1980, I was Mayor of the city of Fort Lauderdale, situated in Broward County, Florida. Through the perspective of the drug war, Broward County was one of the most heavily impacted counties in this country. I have observed first hand the destruction that the drug dealer and his success can have on a community. Since 1981, I have been a member of Congress. In Congress I serve on, among other committees; the House Judiciary Committee; the Subcommittee on Crime; the Select Committee for Narcotics Abuse and Control; and I am Co-Chairman of the House Republican Task Force on Crime. I have attempted to fight the drug war on the federal level for five years.

My first year in Washington made me aware of the enormous challenge our federal government was facing in its attempt to halt the illegal importation of drugs from foreign source countries. The smuggler's ability to finance boats, planes and manpower to infiltrate our borders was overwhelming. Our U.S. Coast Guard and U.S. Customs agencies were essentially civilian in nature and, even with help from the newly created Drug Enforcement Agency, they were no match for

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the smuggler's enterprise. In 1982, the second year of the 97th Congress, I offered an amendment to the Department of Defense Authorization Bill H.R. 3519, to further erode the Posse Comitatus restrictions on our military's involvement in civilian law enforcement by allowing military personnel to make arrests and seizures of drug runners in U.S. territorial waters. The amendment passed the House but was readily defeated in conference. It became evident to me then and still clearer to me in the next two years that the growing drug problem in the United States was far from a national priority and not a politically popular legislative issue in Congress.

In 1983, at the beginning of the 98th Congress, the Vice President's Drug Task Force began to show some successes in South Florida and it helped to temporarily distract the drug trader. There was an increase in arrests of smugglers on the seas and some victories to point to at least on Florida's coastline. However, as in the case with many criminal proceedings, drug dealers were able to hire expensive defense attorneys who developed effective loop-holes and allowed dealers to walk out of federal courtrooms. During the 98th Congress, the Crime Subcommittee shifted its attention toward tightening criminal laws already on the books. Attempts at bail reform and harsher penalties for dealers were introduced and some successes were seen in the Omnibus Crime Control Act of 1984, which passed at the end of that year.

The 99th Congress opened in January 1985, facing essentially the same or worse percentage statistics regarding drug abuse and drug smuggling successes as had existed for the past six years. For those members of Congress, primarily from California, Florida, New York and Texas, who had fought for years for tougher drug laws, the harsh reality remained that nothing had worked to prevent the smuggler from penetrating United States borders. The Select Committee on Narcotics Abuse and Control's latest estimates on drug abuse and trafficking include the following: in 1985 an estimated 85 tons of cocaine entered the United States and the estimate for 1986 is at least 150 tons of cocaine; between 1981 and 1985 the number of hospital emergencies associated with the use of cocaine increased from 3,296 to 9,946; and between 1981 and 1985, the number of cocaine related deaths increased from 195 to 580. The Alcohol, Drug Abuse, and Mental Health Administration of the U.S. Department of Health and Human Services estimates from recent studies the following: that approximately 21.6 million Americans have used cocaine; that 4 million Americans are "current users"; cocaine use by high school seniors reached its highest level ever in 1985 with 17% having used the drug; and 49% of



high school seniors reported in a 1985 survey that it would be easy for them to get cocaine.

## II. Attacking the Demand for Illegal Drugs

The 99th Congress saw a theoretical shift regarding the drug issue and surrounding debates. Accepting our inevitable failure at stopping the drug supply through illegal importation, we began to shift our focus toward demand. The economic reality exists; as long as there remains a demand for illegal drugs in the U.S., someone will be willing to risk the supply. The supply/demand theory did not really sink in for me until January 1986 when I took a trip with the Select Committee on Narcotics Abuse and Control to Texas, Arizona, California and Mexico. The trip focused on the success of illegal aliens crossing our borders with illegal drugs. The U.S. Customs border patrol at the San Diego-Tijuana border post reported their estimate that 82,000 illegal aliens had crossed into the U.S. through just that 60 mile zone in the previous 48 hours. It may have been optimistic to think that we could stop a percentage of smugglers' boats sailing into Florida's harbors and the Gulf Coast states' shorelines, but the realization of a virtually open U.S.-Mexican border put that optimism into perspective.

In July of 1983, President Reagan, through Executive Order 12435, established the Commission on Organized Crime. In March of 1986 the Commission issued its report and concluded that "drug trafficking" was the single most serious organized crime problem facing the world and this country today.<sup>1</sup> The Commission's report recognized the need to focus on the demand-side of the drug problem. The report cited drug testing use and effectiveness in the private sector via a survey of Fortune 500 companies and recommended that drug testing programs be implemented for federal employees. In support of the Commission's findings and recommendations, I announced to my staff my intent to initiate a drug testing program in my congressional office. I announced, on the House floor in March, 1986, that in support of the President's Commission findings and suggestions, I would implement a drug testing program for my Washington staff.

It was my hope at the time of my announcement on the floor that other members of Congress would follow suit. I knew there were enough members of Congress who had conceded to our failures in the

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1. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT, DRUG ABUSE, DRUG TRAFFICKING AND ORGANIZED CRIME (1986).



supply-side and I believed there was substantial speculation of hypocrisy in the halls of Congress to invite the alternative of drug testing. As it turned out, however, a U.S. House Administration determination precluded congressional funds from paying for the tests and the House Committee on Official Conduct ruled to prevent any private corporation from donating the funds for the tests.

I paid for the tests out of my own pocket. The tests were conducted by the Hoffman-La Roche Company's clinical laboratory. It required about ten minutes of my staff's time and cost about ten dollars per staffer. I made it clear to my staff that I did not suspect them of using drugs. I further stated that if a positive test result occurred on anyone, a second alternative test method would be provided as well as a re-test. If a confirmatory test was positive, I intended to speak in private to that staffer. No individual results of the tests were to be made public under any circumstances. My entire Washington staff volunteered; I was impressed with their attitude and pleased with the results.

My intentions in testing my staff were two-fold: one, to demonstrate to the public my confidence in the value of drug testing as a deterrent and a viable component in the demand-side war; and two, to show to the public that we in Congress who enact laws that often infringe upon your rights, are not doing drugs. The facts remain indisputable regarding our inability to stop the drug supply. The facts are also indisputable that citizens in the United States continue to consume outstanding quantities of illegal narcotics. I have been convinced for years that drug abuse is a serious problem in this country and that we must do whatever is within our means to stop it. The demand-side is a new front to fight this battle; I only hope we do not repeat the same mistakes on this front as we made in the supply-side war.

There is no question but that drug testing infringes upon one's rights as does every single law we have passed in Congress to fight the drug war. Prolonged and extensive searches of luggage, cars and planes at our borders infringe on individual rights. The stopping and boarding of ships and yachts by United States Customs and Coast Guard agents infringes upon individual rights and freedoms. Continually raising taxes and extending our federal debt to finance drug interdiction efforts, and drug abuse and rehabilitation programs infringes upon individual freedoms. Asking someone to submit to a urinalysis test infringes upon one's rights. Societal interest as a counter balance to the enactment and enforcement of laws that infringe upon individual rights must be strong and must present a larger cause to justify such imposition.

Fundamental constitutional questions concerning drug testing re-



main the same as in all due process issues: is the right impinged upon a constitutionally protected right; and what amount of justification must the government put forth to successfully defend that infringement? Procedural due process has really been the issue reviewed in cases involving drug testing and the focus has been on the process used to carry out a test or to terminate an employee via a test result.<sup>2</sup> However, the moment that drug testing began to approach the halls of Congress, several avenues of constitutional attack arose to defeat it. The arguments range from fourth amendment violations of search and seizure to invasion of a privacy right to violations of substantive and procedural due process. Whether drug testing is a violation of a constitutional right depends upon the circumstances surrounding the test and the right alleged to be violated. I believe the primary constitutional question framed by the drug testing issue is the application of fourth amendment protections to the testing process.

There is no question but that a government employee is entitled to the same constitutional rights against unreasonable search and seizure as any citizen,<sup>3</sup> and as such is always entitled to these protections, not just when he or she is suspected of criminal behavior.<sup>4</sup> A governmental taking of a urine specimen has been held to be a seizure within the meaning of the fourth amendment.<sup>5</sup> However, such testing in the perspective of a requirement in a medical exam, in my opinion, does not represent an overly intrusive government act. Urine is routinely discharged from the body, so unlike the taking of blood as a context for seizure,<sup>6</sup> no governmental intrusion into the body is required to seize urine.<sup>7</sup>

From the beginning of my efforts to pass drug testing legislation, I have emphasized that one's right to notice of testing be respected, that one's privacy from public exposure be a priority and that one's right to a re-test and to appeal a positive result be set forth. Most legal opinions ruling against drug testing have been based upon the implementation of a particular test and the attendant or subsequent treatment of a partic-

2. *Jones v. McKenzie*, 628 F. Supp. 1500, 1507 (D.D.C. 1986).

3. *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985).

4. *Camara v. San Francisco Mun. Ct.*, 387 U.S. 523, 530 (1967).

5. *See Allen*, 601 F. Supp. at 482. *See also Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984).

6. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

7. *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987).



ular employee or employees.<sup>8</sup> There are, no doubt, unlimited circumstances where a procedure for testing and treatment of an employee would not be fair and would be violative of constitutional protections. However, a reasonable testing procedure exists and it must be implemented cautiously and with an eye toward respect of individual rights. A specifically set forth procedure for testing which includes reasonable safeguards and is closely tailored to further a legitimate governmental interest has been held to pass constitutional scrutiny.<sup>9</sup>

The fourth amendment protects an individual's expectation of privacy from unreasonable intrusions by the government. Whether, under a particular circumstance, a reasonable expectation of privacy exists and whether the intrusion is reasonable are determined by balancing the claims of the public against the interest of the individual.<sup>10</sup> How strong a claim to protection of the public interest does drug testing carry? Do the American people want to protect a government employee's right to ingest illegal narcotics without risk of exposure? In order to receive the protection of the fourth amendment, an expectation of privacy must be one that society is prepared to recognize as legitimate.<sup>11</sup>

A drug testing policy passed by Congress and supported by the President in response to an overwhelming health crisis in this country may establish the basis for a degree of government intrusion. The government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employees' performance of their duties.<sup>12</sup> A drug testing program on an employee-wide basis, structured not to catch anyone but simply to deter drug abuse may satisfy constitutional standards. A distinction has been drawn between a search made by the government for criminal investigatory purposes and a search made by the government as employer to protect the work product of an office.<sup>13</sup> Thus, where the purpose of a government employer's search is not to gather evidence of a crime un-

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8. See, e.g., *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976); *Allen*, 601 F. Supp. at 482; and *McDonell*, 612 F. Supp. at 1122.

9. *Shoemaker v. Handel*, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

10. *Division 241 Amalgamated Transit Union*, 538 F.2d at 1267; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

11. *New Jersey v. T.L.O.*, 105 S. Ct. 733, 742 (1985).

12. *Allen*, 601 F. Supp. at 491.

13. *United States v. Huggerty*, 388 F.2d 713 (7th Cir. 1968).



related to an employee's performance, but is rather undertaken for the proprietary purpose of preventing future damage to the government's ability to discharge its statutory responsibilities, it may be a legitimate search within the confines of the fourth amendment.<sup>14</sup>

I believe the federal government has the right to insure that its employees are conducting their work within a drug free work place. I further believe that a reasonable testing program is available to help promote a drug free federal work force. I can attest first hand only to the implications of the test that my staff and I underwent. The procedure was simple, it was carried out in private, the objective labeling and sealing process took place in the presence of each staffer and the results remain 100% confidential. I do not think that the test I implemented at my staff level was unreasonable; I believe it would pass constitutional muster. Other such tests under similar circumstances are carried out in this country every week.

### III. Recent Trends

On September 15, 1986, President Reagan issued an Executive Order entitled "Drug Free Federal Work Place," wherein he ordered the implementation of a controlled substance testing program for employees of the federal government employed by the executive branch. In that order, the President set forth specific guidelines for drug testing procedures which include: a sixty day prior notice to employees; opportunity to submit medical documentation which could substantiate an effected test; an assurance of individual privacy regarding the providing of urine specimens; the application of existent federal law with respect to the confidentiality of test results; and an authorization to the Secretary of Health and Human Services to promulgate scientific and technical guidelines regarding the test procedure.<sup>15</sup> I supported the President's initiative and have indicated my willingness to introduce legislation necessary to bring the dictates of that order into compliance with current federal law where necessary. I hope the 100th Congress will bring more successes to drug testing legislation than this past session observed.

On March 6, 1986, immediately following my announcement that I was to test my own staff and discovering that there existed no means within budget to pay for those tests, I introduced H. R. Res. 394. The

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14. *Allen*, 601 F. Supp. at 491.

15. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).



relevant text of H. R. Res. 394 reads as follows:

That until otherwise provided by law, amounts shall be available from the contingent fund of the House for payment of expenses of a controlled substances testing program. Each Member and officer of the House, and . . . each employee of the House shall be eligible to participate in the program. Participation shall be entirely voluntary on the part of the participant.<sup>16</sup>

As stated earlier herein, it was my hope that this legislation would at the least attract the support of those members who wanted to initiate demand-side programs. The resolution did pick up the cosponsorship of twelve members of Congress. However, it was referred to the jurisdiction of the Committee on House Administration and after one brief hearing in October of 1986, the bill died in committee.

On April 17, 1986, I introduced a bill to provide for a controlled testing program for federal civilian and military personnel whose duties involved access to classified information.<sup>17</sup> The bill was referred jointly to the Committee on Armed Services, the Committee on Post Office and Civil Service and the Committee on House Administration. This proposed legislation picked up only three House cosponsors, was never afforded a hearing and died in committee.

Toward the end of the 99th Congress, the leadership in the House determined that the country's drug problem might be used as an effective political issue for the 1986 elections. Consequently, the introduction and debate of drug enforcement legislation became politically popular. Numerous hearings were hastily scheduled to push new and old legislation to the floor. The political effort resulted in the passage of H.R. 5484, a 481 page bill consisting of a conglomeration of dozens of pieces of legislation and amendments thereto.<sup>18</sup> The bill represents a good cross section of legislation which strengthens the drug interdiction, supply-side, effort and legislation that appropriates millions of new dollars for rehabilitation and drug abuse prevention; the new demand-side war. There is no provision for drug testing or even a study of drug testing in the bill.

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16. H.R. Res. 394, 99th Cong., 2d Sess. (1986).

17. H.R. 4636, 99th Cong., 2d Sess. (1986).

18. H.R. 5484, 99th Cong., 2d Sess. (1986).



#### IV. Conclusion

I started my education regarding the success and failure of federal legislative responses to the illicit drug trade in 1981. That was in the midst of the supply-side effort. In 1986, it became evident to me that of all the avenues we had tried, the reality remained that nothing had worked. There were those members of Congress who wanted to get tough in the supply-side war eight years ago but Congress did not listen. The supply-side war failed and the federal government was always ten steps behind the drug dealer. In May of 1986, I introduced H.R. 4815, "The Drug Dealer Capital Punishment Act of 1986." It was referred to the House Judiciary Committee, where it was not afforded a hearing. However, it passed on the House floor as an amendment to the Omnibus Drug Bill, H.R. 5484 and it became the most controversial amendment to the bill and was eventually defeated by the threat of a filibuster in the Senate.<sup>19</sup>

When I introduced that legislation, I knew I harbored some very complex feelings about it. I considered it an attempt to elevate the crimes of the drug dealer to those crimes considered the most serious in this country, those subject to the death penalty. It represented a turning point in the theretofore failing efforts against the drug dealer. The bill was termed by its supporters as the ultimate weapon against the drug trader. The reality is, in my opinion, that we should never have had to reach that point. We should have passed effective, tough legislation at the beginning of the supply-side war instead of the attenuated compromises that ultimately failed. It is my belief that we are embarking down the same path in the demand-side war. I feel that drug testing, though in some instances unproven and in some instances to date not procedurally fair, is the hard answer that may put us ahead of the curve in this new battle.

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19. CONG. Q., 2699 (Oct. 25, 1986).